BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FAUSTINA FORONDA
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-348
Case No. 76-9863

S.S.A. No.

HELPERS OF MENTALLY RETARDED
(Employer)

Employer Account No.

Office of Appeals No. SF-2921

The claimant appealed from the decision of the Administrative Law Judge which dismissed the appeal as untimely filed.

STATEMENT OF FACTS

On August 5, 1976 the Department mailed to the claimant a determination that disqualified her for benefits on the ground that she had voluntarily left her most recent employment without good cause within the meaning of section 1256 of the Unemployment Insurance Code. An accompanying ruling relieved the employer's reserve account of charges pursuant to section 1030 of the code.

On the same date, and mailed in the same envelope, the Department sent the claimant a notice of overpayment of benefits. This notice informed the claimant that she had been overpaid the sum of $410, such benefits having been paid before it was determined she had left her employment without good cause.

The determination and notice of overpayment were received by the claimant without delay in the normal course of the mails. On the face of each document the claimant was informed, through a combination of printed and typewritten language, that the last day on which a timely appeal could be filed was August 25, 1976.

The claimant's appeal was filed by means of a letter dated and postmarked September 11, 1976. Such appeal, therefore, was filed 17 days beyond the indicated deadline.

At the hearing before the Administrative Law Judge, evidence was received on the question of timeliness of the appeal as well as on the merits of the case. The hearing judge found that she had not demonstrated "good cause" for the late filing. He therefore dismissed her appeal and did not decide the matter on the merits.

Our review of the entire record, including the hearing transcript, leads us to the same factual conclusion as that reached by the Administrative Law Judge as to the reason for the late appeal. The claimant read and understood the meaning of the 20-day time limit on the determination and on the notice of overpayment. However, she erroneously interpreted certain other language contained in the determination which informed her she was disqualified until she returned to work and earned at least $410 in bona fide employment. This language, which appears on all determinations when applicable, is a paraphrase of section 1260(a) of the code which provides that disqualifications assessed under section 1256 are to be "purged" by earning five times the weekly benefit amount in bona fide employment. The claimant was also given a verbal explanation of the "purging" procedure by a Department representative at the local claims office.

The claimant mistakenly believed that she could not appeal the determination until she had earned the $410. The error was entirely her own and it is not contended that the Department in any way misled or misinformed her.

The claimant's eventual appeal was triggered by her receipt of a form letter from the Department, dated September 9, 1976, requesting her to make arrangements to repay the $410 overpayment. (It is, of course, merely coincidence that the amount of overpayment and the amount

required to "purge" the disqualification are identical.) In her reply letter, which was accepted as an appeal, she stated she had "kept silent" because she had not earned the required $410, and she asked for "a chance to appeal."

REASONS FOR DECISION

The question we are called upon to decide is: Does a claimant who filed her appeal 17 days late solely because of a mistake on her part regarding appeal rights and procedures have good cause for the lateness to be excused under the applicable statutes?

Prior to January 1, 1976, sections 1328 (covering determinations) and 1377 (covering notices of overpayment) of the Unemployment Insurance Code provided a 10-day time limit on appeals. These statutes also provided that the 10-day limit "may be extended for good cause." However, the statutes neither stated nor suggested what might constitute "good cause."

A number of court decisions have provided some judicial guidelines for interpreting the phrase "good cause." Thus, in Gibson v. Unemployment Insurance Appeals Board (1973), 9 Cal. 3d 494, 108 Cal. Rptr. 1, 509 P 2d 945, the California Supreme Court held that where an appeal was filed three days late because of a clerical error in the office of the claimant's attorney, the late appeal was legally excusable under the "good cause" language of the statute. A virtually identical result was reached by the Court of Appeal in Flores v. Unemployment Insurance Appeals Board (1973), 30 Cal. App. 3d 681, 106 Cal. Rptr. 543.

However, in Fermin v. Department of Employment (1963), 214 Cal. App. 2d 586, 29 Cal. Rptr. 642, the court refused to excuse a three months' delay where no particular explanation was offered for the late filing. In Perez v. Unemployment Insurance Appeals Board (1970), 4 Cal. App. 3d 62, 83 Cal. Rptr. 871, the court likewise declined to excuse a five months' delay occasioned solely by the claimant's belief that the adverse determination was correct.

In the recent case of Martinez v. California Unemployment Insurance Appeals Board (1976), 63 Cal. App. 3d 500, 133 Cal. Rptr. 806, the court considered an appeal filed 20 days late. The claimant offered a combination of reasons

for his late filing. He was "mad" at being disqualified; he was moving; and his wife and children had the flu. The court found that the proffered excuses did not amount to "good cause" for the untimely filing.

Another recent pertinent decision is United States Postal Service v. Unemployment Insurance Appeals Board (1976), 63 Cal. App. 3d 506, 134 Cal. Rptr. 19. That case involved an untimely appeal by an employer. The appeal was three days late, and the reason advanced by the employer for the untimely filing was that a change of mailing address for Department notices and determinations had caused some delays in processing such notices and determinations. The employer characterized such problems as temporary, and stated they would shortly be eliminated. Applying the rationale of the Gibson case, the court held that the employer's delay was excusable under the "good cause" provision of section 1328. The court also emphasized that, in determining whether "good cause" exists, the same criteria shall be applied to claimants and employers alike without distinction.

The latest decision by an appellate court on this issue, and one we believe to be highly significant, is the case of Amaro v. California Unemployment Insurance Appeals Board (1977), ___ Cal. App. 3d ___, 135 Cal. Rptr. 493. In that case, the claimant's appeal was filed one month and one day beyond the statutory deadline. Her explanation was that she was upset about being denied benefits and had failed to read the portion of the determination relating to appeal rights. Later on, after the appeal time had run, she filed an appeal on the advice of a friend. The court held that she had failed to demonstrate good cause for the late appeal. We shall revert to the Amaro case later.

It should be noted at this point that all of the cases we have cited above, including Amaro, involved the construction of section 1328 (and by logical inference section 1377) in the old form. As previously noted, these sections of law were amended effective January 1, 1976. The claimant's case is governed by the new version of the statute.

The amendments made two changes in sections 1328 and 1377. The appeal period was lengthened to 20 days and certain criteria for adjudicating "good cause" were added. Both statutes now read, in part:

> "'Good cause,' as used in this section, shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect."

As the court pointed out in Amaro, these concepts are taken generally from section 473 of the Code of Civil Procedure.

As far as we know, there have been no appellate court decisions issued up to the moment that construe these statutes in their new form. Nor have we previously issued any precedent decisions relating to the amended versions. However, over the years, we have considered various aspects of timeliness of appeal issues.

We have consistently held that the issue of timeliness of appeal involves a concurrent jurisdictional question. Unless an appeal is timely filed, or unless it is found that there is "good cause" under the statute for a late filing, the Administrative Law Judge has no jurisdiction to decide the case on the merits (Appeals Board Decisions Nos. P-B-36, P-B-199, and P-B-220). Procedurally, hearing judges have the discretion either to make an immediate finding on the "good cause" question at the outset of the hearing following receipt of appropriate evidence, or to take evidence on the merits as well as on timeliness, reserving decision on the timeliness issue.

We have held that "good cause" exists for a late appeal when the delay is occasioned by nonreceipt of the determination by an appellant (Appeals Board Benefit Decisions Nos. 4909 and 5914). However, we have not found "good cause" where an appeal was filed a month late because the appellant failed to apprise the Department of a change of address, and also failed to make arrangements for forwarding of mail (Appeals Board Benefit Decision No. 5966).

We have found "good cause" when a late appeal is the result of erroneous information or advice from the Local Office which discourages the filing of an appeal (Appeals Board Benefit Decision No. 6504).

We have also considered cases where claimants had become ineligible for unemployment insurance benefits because of disability occurring before or during the statutory

period for appealing disqualifications under section 1256 of the code. In some of these cases, the claimants have mistakenly believed their ineligibility for benefits foreclosed their appeal rights concerning the previous separation from employment. We have held that late appeals due to mistakes of this kind may be excused under the "good cause" exception of the statute.

In the case at hand, we are called upon to adjudicate "good cause" in a factual matrix that seems clearly to come within the ambit of the new statutory language. In the absence of a controlling court decision on this point, we must provide our own interpretation of "mistake" as used in the new sections.

The administrative law judge has found that the claimant's late appeal was the direct result of her misapprehension of her appeal rights. As the hearing judge stated: "She did read the 20-day limit for filing, but thought the Department interviewer's statement [that the claimant would not be eligible for benefits until she purged the disqualification by earning $410 in bona fide employment] took precedence." As we have already stated, we fully concur with the Administrative Law Judge's finding as to the reason for the late appeal.

The claimant clearly made a mistake. Of that there is no question. She confused purging a disqualification with filing an appeal from an adverse determination. Whatever fault was involved was solely that of the claimant. However, the record indicates that as soon as she understood appeal rights and procedures she immediately filed her appeal. On these facts, has the claimant demonstrated "good cause" for excusing the untimely appeal?

We shall confine ourselves in this decision to the concept of "mistake" in the statute, for that is what is involved. We need not now explore the meanings of "inadvertence, surprise, or excusable neglect."

Perhaps the first question to be considered is what kind of "mistake" does the statute contemplate? There is no problem with the general meaning of the word "mistake." The difficulty arises with trying to determine the subject matter of the mistake. Does the statute refer to a mistake concerned wholly with appeal rights and procedures as such, or does it intend some broader meaning?

There are innumerable kinds of "mistakes" which appellants may offer as explanations for untimely appeals. For example, a claimant may erroneously believe he has been hired in a new position and will not need benefits. He allows his appeal time to expire, but upon learning the new job has fallen through, he files a late appeal. An employer may forego appealing because he mistakenly thinks his account will not be charged. When he discovers that it will be, he appeals after the time has run.

In a broad sense, it could be argued that such late appeals resulted from "mistakes." But are these the types of "mistakes" envisioned by legislative intent in the statute? We think not. In our judgment, the statute is intended to cover only "mistakes" involving appeal rights, procedures, and time limits as such. We do not believe the Legislature intended by this language to embrace "mistakes" relating to extrinsic matters.

The claimant clearly meets this test. She was completely -- but sincerely -- mistaken in believing she could not appeal until she had purged the disqualification by sufficient earnings. Her late appeal was the direct result of a mistake relating to appeal rights. The delay of 17 days was not inordinate, and as soon as she understood her rights, she took immediate steps to file the appeal. This is the type of situation, in our view, for which the statute was intended to afford relief.

In reaching this result, we have been greatly influenced by the rationale of the court in the recent Amaro decision. The final sentence of the court's opinion appears to be the key to the entire question of untimely appeals:

> ". . . Since the delay in seeking the appeal was substantial, and the stated reason for delay less than substantial, we conclude that the trial court correctly denied the relief sought by petitioner."

The court's approach, as set forth in the above language, represents the identical philosophy that we have employed over the years on timeliness issues. The more substantial the delay, the more substantial must be the reason demonstrated for the delay, and an extraordinary delay must have an extraordinary explanation.

We note that the court in Amaro took cognizance of the change in wording of section 1328 effective January 1, 1976, although the case itself involved the old version of the section. We see nothing in the court's opinion that suggests there will be any departure from the rationale of previous decisions as a result of the new language added to the statute.

In deciding whether relief should be granted in untimely appeal situations, administrative law judges should consider all relevant factors, including:

(1) The length of the delay;

(2) The reason for the delay;

(3) The diligence of the appellant in acting to protect his rights;

(4) What prejudice, if any, may result for the other parties or the Department if relief is granted (e.g., will witnesses still be available; has evidence been destroyed; are pertinent records still available, etc.?)

Each case of an untimely appeal should be evaluated on its own particular facts. Instead of rigid formulas, common sense and basic equity should be applied in making a decision as to whether relief should be granted to the dilatory appellant.

DECISION

The decision of the Administrative Law Judge is set aside. The matter is remanded to the Administrative Law Judge for a decision on the merits.

Sacramento, California, May 12, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

When the legislature conferred upon this Board the power to designate certain of our decisions as "precedents," and thus bind the Employment Development Department, Department of Benefit Payments, and the Administrative Law Judges, that authority came to us coupled with the implied trust that such decisions would be consistent with the precedents established statutorily by legislative enactment and decisionally by judicial decree. The instant "precedent decision" does not honor and obey that trust. Rather, the majority decision ignores the sage advice penned by "Publius" in The Federalist Papers while our government was still in its embryonic stage:

> "It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood...or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow."

In the instant case, the majority set out to confect a rule to govern which types of "mistakes" will constitute good cause for filing of untimely appeals. The product of their labor, unfortunately, is a hodge-podge of mumbo-jumbo which leaves unanswered the main question (viz., what types of "mistake" come within the purview of §1328), which makes the dimension of time the overriding consideration, and which (in my humble opinion) misstates the rule in Amaro v. California Unemployment Insurance Appeals Board (1977), 65 Cal App 3d 715. On the other hand, the majority overlook the fact that ample precedent is currently existent and readily available for use in deciding most cases under the amended §1328 and 1330.

Effective January 1, 1976, §1328 and 1330 were rewritten to add the proviso that "good cause" for the untimely filing of an appeal "shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect." (Statutes 1975, Chapter 979, emphasis added) The underscored language is identical to the provisions of §473 of the Code of Civil Procedure, which for 105 years have been the tests applied by the courts of this state for relieving parties from judgments, orders, or other proceedings taken against them. Since the enactment of

§473 in 1872, a veritable mass of decisional law has been accumulated, catalogued and annotated, so that anyone desiring to learn the judicial interpretation and meaning of "mistake, inadvertence, surprise or excusable neglect," with respect to being relieved of defeat by default, need only consult the published reports of our appellate courts. Thus, there is more than ample precedent extant as to the meaning of "mistake" within the context of §1328 and 1330, and there is no need for this Board to manufacture new rules.

Moreover, there is sound judicial precedent requiring that the court-decreed precedents applicable to §473 be used to interpret the provisions now amended into §1328 and 1330. In 1963, the legislature enacted the so-called Government Tort Liability Act (Government Code §900 et seq.), following the landmark decision in 1961 in Muskopf v. Corning Hospital Dist. (55 Cal 2d 211) in which the California Supreme Court struck down the doctrine of sovereign immunity. The procedures for filing claims against government entities in this act are complex, with specific time limitations imposed upon claimants. In Government Code §911.6, the legislature wrote an exculpatory provision, excusing untimeliness in filing claims where the failure was through "mistake, inadvertence, surprise, or excusable neglect." In Viles v. State of California (1967), 66 Cal 2d 24, the Supreme Court ruled:

> "The showing required of a petitioner seeking relief because of mistake, inadvertence, surprise or excusable neglect under [the Government Tort Liability Act] is the same as required under §473 of the Code of Civil Procedure for relieving a party from a default judgment." (66 Cal 2d at 29, emphasis added.)

Viles was a case in which the claim was filed untimely by reason of mistake, and the court, true to its rule, applied the §473 tests. I submit, that the use by the legislature of the identical language from Code of Civil Procedure §473 in Government Code §911.6 (and later in Government Code §946.6 as well) and the Viles case, all stands as firm precedent for the use of the §473 interpretation with regard to Unemployment Insurance Code §1328 and 1330. In fact, the legislature, being presumed to know the judicial interpretation of the identical timeliness provisions in the Government Tort Liability Act, must have meant the same interpretation to apply to §1328 and 1330 as a general rule of statutory construction, and had the legislature intended otherwise, it would have so stated.

Just as the Supreme Court held in the leading case of Gibson v. Unemployment Insurance Appeals Board (9 Cal 3d 494) with regard to the interpretation of §1328 and 1330 prior to the January 1, 1976 amendment, the courts in interpreting §473 have also applied its remedial features liberally toward the goal of permitting a proceeding on the merits (Benjamin v. Dalmo Manufacturing Co., 31 Cal 2d 523; Vertanian v. Croll, 117 Cal App 2d 639; Ramsey Trucking Co. v. Mitchell, 188 Cal App 2d 862). But, just as the decision states in Gibson, relief is not granted in every case (Salazar v. Steelman, 22 Cal App 2d 402; Security Truck Line v. Monterey, 117 Cal App 2d 441; Fidelity Federal Savings & Loan Association v. Long, 175 Cal App 2d 149.

Turning to the judicial decisions under §473 where, as here, there has been a mistake of law, the cases indicate that the determining factor is the reasonableness of the misconception (Waite v. Southern Pacific Co., 192 Cal 467; Beard v. Beard, 16 Cal 2d 645; Svistunoff v. Svistunoff, 108 Cal App 2d 638; Fickeisen v. Peebler, 77 Cal App 2d 148; Roehl v. Texas Co., 107 Cal App 708). As the court stated in A&S Air Conditioning v. Moore Co. (184 Cal App 2d 617):

> ". . . The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. . . . Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief. . . ."
> (184 Cal App 2d at 620)

In some cases relief has been denied where there was mistake or inadvertence, but the party was negligent. In such case, the decision is based on inexcusable neglect, as in the following: Slater v. Selover (25 Cal App 525) where the defendant gave the summons to his business partner, who forgot about it; Yarbrough v. Yarbrough (144 Cal App 2d 610) where the defendant was served with summons but claimed he mislaid the documents; Fulton & Co. v. United States Overseas Airlines (194 Cal App 2d 546) where the corporation president turned the matter over to his advertising adviser, who turned it over to an attorney, who did nothing; and Kooper v. King (195 Cal App 2d 621) where the summons and complaint were simply filed and forgotten.

In the case now before this Board, the claimant received the Department's determination shortly after it was mailed. She reads and understands English. She read the provision that any appeal "must be filed on or before 8/25/76 to be timely." However, the claimant recalled that during a conversation with a Department interviewer at an earlier date, she was told she would have to earn $410 before the Department would remove her disqualification. She believed the information given her by the interviewer took precedence. When the claimant received a further letter from the Department dated September 9, she decided to appeal. Her appeal was 17 days late.

To me, the case here is governed by the rule announced in A&S Air Conditioning v. Moore Co. (supra). That judicial authority is applicable here and supports the decision of the Administrative Law Judge, which finds there has not been a showing of good cause for the untimely appeal. In A&S Air Conditioning, the court held that "ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief." Here, the claimant was confused concerning the remedies available to her, but she could have removed that confusion and easily ascertained with certainty her rights by the simple expedient of a phone call to the Department and a further conversation with the interviewer. Such is the course of action that a prudent person would be expected to follow. What we have then is a neglect to clarify a mistake, which neglect cannot be said to be excusable. Consequently, relief would be denied either under §473 of the Code of Civil Procedure or §1328 of the Unemployment Insurance Code.

Finally, the majority, in manufacturing their unprecedented tests in disregarding §473, announce great reliance on the Amaro case (supra). My reading of Amaro does not find support for such reliance. The true rule reached by the court in Amaro is that dismay occasioned by the denial of benefits does not constitute good cause for the late filing of an appeal. The claimant also argued that the doctrine of equitable estoppel should be applied against the Department, but the court rejected that argument, citing strong public policy reasons therefor. The court explained that, to substitute the doctrine of equitable estoppel for the statutory time limit would have the effect of wiping out time limitation. In this discussion, the court noted that, subsequent to the late appeal by Amaro, the legislature had amended §1328 (as described supra), but the court pointed out that the legislature had not eliminated the existence of a time limit, and had extended the limit to 20 days and had added the "good cause" provisions in the terminology of Code of

Civil Procedure §473. Nowhere in the court's decision does it say what the majority opinion indicates. The quotation of the final sentence of the Amaro decision, which is described on page 7 of the majority opinion as "the key to the entire question of untimely appeals" is actually taken out of the context in which it was stated by the court. When read in that context, it is plain to see that the language does not stand for the principle ascribed thereto by the majority:

> "We decline petitioner's invitation to apply the doctrine of equitable estoppel against the government in the case at bench. Since the delay in seeking the appeal was substantial, and the stated reason for delay less than substantial, we conclude that the trial court correctly denied the relief sought by petitioner." (65 Cal App 3d at ___)

HARRY K. GRAFE